3-2-1976

C.C.C. Coal Company, Inc., et al v. Pike County, Kentucky, et al

Reply Brief 1975-SC-0714

REPLY BRIEF

536 SW 2d 467

SUPREME COURT OF KENTUCKY

File No. 75-714

C.C.C. COAL COMPANY, INC.,
et al — APPELLANTS

v.

PIKE COUNTY, KENTUCKY,
et al — APPELLEES

APPEAL FROM THE PIKE CIRCUIT COURT
HON. REED D. ANDERSON, JUDGE

BRIEF IN RESPONSE TO AMICI CURIAE RED FOX COAL COMPANY, HILL GAIL COAL COMPANY, NATIONAL MINES CORPORATION, AND KENTUCKY COAL ASSOCIATION, INC.

DAN JACK COMBS
207 Caroline Avenue
Pikeville, Ky. 41501

ATTORNEY FOR APPELLEES

(Certificate of Service on Inside of Front Cover)

CERTIFICATE OF SERVICE

This is to certify that copies of the within brief were served on this 23rd day of February, 1976, pursuant to RCA 1.250 by mailing true copies of same, postage prepaid, to Hon. Reed D. Anderson, Judge of the Pike Circuit Court, Division No. 1, Pikeville, Kentucky, 41501; Hon. John M. Stephens and Hon Donald Combs, Pikeville, Kentucky, 41501; Hon. William J. Baird, III and Hon. Charles J. Baird, Pikeville, Kentucky, 41501; Hon Henry D. Stratton, Pikeville, Kentucky, 41501; Hon. Herbert F. Boehl, 2300 Louisville Trust Bank Building, Louisville, Kentucky, 40202; Hon. Joseph J. Leary, 206 St. Clair Street, Frankfort, Kentucky, 40601; Hon. Bennett Clark, 1000 First Security Plaza, Lexington, Kentucky 40507 and Hon. Edward W. Hancock, Attorney General of Kentucky, Frankfort, Kentucky, 40601.

Dan Jack Combs
207 Carolyn Avenue
Pikeville, Kentucky 41501

ATTORNEY FOR APPELLEES

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STATEMENT OF THE QUESTIONS PRESENTED

I. IS THE PIKE COUNTY FRANCHISE TAX IN VIOLATION OF ARTICLE 1, SECTION 8 OF THE CONSTITUTION OF THE UNITED STATES AND THEREFORE INVALID?

II. IS THE PIKE COUNTY FRANCHISE TAX ORDINANCE INVALID ON ANY OTHER GROUNDS?

SUPREME COURT OF KENTUCKY

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BRIEF IN RESPONSE TO AMICI CURIAE RED FOX COAL COMPANY, HILL GAIL COAL COMPANY, NATIONAL MINES CORPORATION, AND KENTUCKY COAL ASSOCIATION, INC.

MAY IT PLEASE THE COURT:

ARGUMENT

I. THE PIKE COUNTY FRANCHISE TAX ORDINANCE IS NOT VIOLATIVE OF ARTICLE I, SECTION 8 OF THE UNITED STATES CONSTITUTION AND THUS IS NOT INVALIDATED THEREBY.

Amici, Red Fox Coal Company, Hill Gail Coal Company and National Mines Corporation,cite Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929 (1923), which states that the mining of ore from the ground is not interstate commerce. However, amici infer from the Supreme Court's statement, "The ore does not enter interstate commerce until after the mining is done,...." that it must necessarily enter interstate commerce immediately after the act of mining is completed. In Oliver Iron Mining, the output of the mines "passe[d] at once into the channels of interstate commerce." Thus, the inference can not, without further support, be a proper conclusion. The other cases cited by amici, such as Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157, 74 S.Ct.

396 (1954), and Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S.Ct. 815 (1947), involved activities which were directly linked to interstate commerce. In each of these cases, the product was already in interstate commerce; the activities taxed were acts of redirecting the flow of that commerce, either by causing it to flow in a different direction or by altering the speed by which it flowed.

In the case at bar, the tax is imposed upon an intermediary step between physical removal of the coal from the ground and interstate commerce. Indeed, the facts suggest that the subject-matter taxed, receiving and/or processing coal, is comparable to manufacturing. Manufacturing, like

mining, is not interstate commerce. Oliver Iron Mining, supra.

Whether comparable to manufacturing or not, it is an intermediary step. In Alaska v. Arctic Maid, 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed 2d 227 (1961), the Supreme Court, in an 8-1 decision, upheld the validity of a state tax on the business of "Freezer ships and other floating coal storages . . . bought or otherwise obtained for processing through freezing." The gist of the decision was that, whether the fish were taken by the catcher boats of the taxpayers or obtained from other fishermen, the business taxed was a part of the overall business of taking fish, and thence clearly not interstate commerce. Here the business is part of the removal of

coal - not ist physical removal from the ground, but its overall removal - and thus clearly not interstate commerce.

Furthermore, the instrumentalities used in prosecuting the business in Arctic Maid were interstate carriers. Here, the coal is neither received or processed on interstate carriers, but at local plants set up for that purpose. Thus, the argument upheld in Arctic Maid should receive even stronger consideration here than in that case.

Arctic Maid cites the Oliver Iron Mining case in support of its decision. Other cases which cite Oliver Iron Mining in support of similar conclusions are Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938), and Coverdale v. Arkansas-Louisiana

Pipe Line Co., 303 U.S. 604, 58 S.Ct. 736, 82 L.Ed. 1043 (1938).

The presumption is that a statute or ordinance is constitutional. Moore v. State Board of Charities and Corrections, 239 Ky. 729, 40 S.W.2d 349 (1931). The cases cited above support that constitutuonality. The cases cited by amici are inapplicable. Therefore, the presumption should not be overcome.

If this Court should hold that the ordinance would be unconstitutional on the basis that it discriminates against those persons, firms, and corporations who receive and/or process coal for distribution outside the county only, and thus within interstate commerce, then it should strike the phrase "for distribution outside Pike County" and uphold the

remainder of the ordinance. Appellees refer the Court to their Brief in response to appellants on this point.

II. THE PIKE COUNTY FRANCHISE TAX ORDINANCE IS NOT INVALID ON ANY OTHER GROUNDS SUGGESTED BY AMICI.

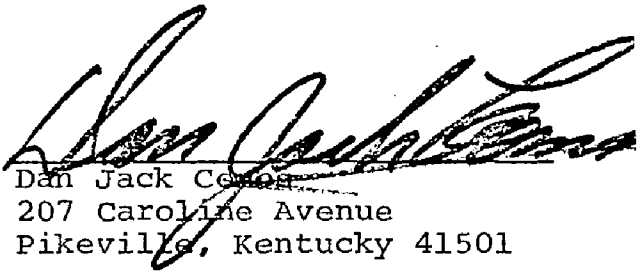
In response to the argument which amici present, appellees direct the Court's attention to their Brief in response to appellants and state that the arguments made therein are dispositive of the aforesaid issues.

CONCLUSION

The Pike County franchise tax ordinance does not impinge unconstitutionally upon interstate commerce. For that reason, and in view of the arguments presented in their brief in reply to

appellants, appellees feel that the Court should affirm the decision of the Circuit Court.

Respectfully submitted,



Dan Jack Conn
207 Caroline Avenue
Pikeville, Kentucky 41501

ATTORNEY FOR APPELLEES